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IN THE

Supreme Court of the United States

..... TERM, 1943

No. 13 ..... Original

In the Matter

of the

Petition of the REPUBLIC OF PERU, owner of the Peruvian Steamship "UCAYALI," for a writ of prohibition and/or a writ of mandamus against the Honorable WAYNE G. BORAH, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the other judges and officers of said court.

BRIEF FOR THE REPUBLIC OF PERU

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BRIEF FOR THE REPUBLIC OF PERU

I.

Issues Presented.

This application presents the following basic questions:

1. Whether, even though, pursuant to the instructions of the Attorney General of the United States, the United States Attorney at New Orleans had presented to the Court the application for immunity of the Republic of Peru, recognized and approved by the Department of State in the following words:

> "The Department will appreciate it if you will instruct the United States District Attorney in New

> Orleans to present to the court the attached certified copy of the Ambassador's note and to say that this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali,* and recognizes and allows the claim of immunity"

the Republic of Peru, a friendly sovereign government, has waived its privilege and right to decline to submit to the jurisdiction of an American court upon the libel of a private corporate suitor, a national of the Republic of Cuba, by applying to the District Court in which it has been sued for an extension of time within which to present its pleas and defenses to the libel filed against it and particularly but not exclusively the defense of sovereign immunity (with full reservation and without waiver of any defenses and objections, particularly but not exclusively sovereign immunity).

2. Whether, in the above mentioned circumstances, by taking within the District within which suit was brought against it, the deposition of the master of its steamship *Ucayali,* the deposition being taken solely to perpetuate his testimony because of the prevalent war conditions and the fear that the witness might never again be available (with full reservation and without waiver of the right to plead sovereign immunity), the Republic of Peru, a friendly sovereign government, has waived its privilege and right to decline to submit to the jurisdiction of an American court upon the libel of a private corporate suitor, a national of the Republic of Cuba.

II.

History of Proceedings.

On or about the 18th day of November, 1941, the Republic of Peru, as owner of the Peruvian steamship *Ucayali,* through the interposition of its agent, Compania Peruana

de Vapores y Dique del Callao, agreed to let, and one Pardo, a Peruvian citizen, agreed to hire, the said steamship *Ucayali* for the transportation of a full cargo of sugar in bags from Peruvian ports to New York. Thereafter, the vessel loaded approximately 3,600 tons of sugar in bags, and on March 3, 4 and 6, 1941, issued bills of lading consigning said cargo for delivery to Order at the port of New York subject to all the terms, conditions and exceptions, including war clauses and clauses authorizing the said cargo to be discharged at other ports than the destination, in appropriate circumstances, contained in said bills of lading and in the charter party hereinbefore referred to.

Thereafter, the said vessel proceeded toward the port of New York in compliance with the terms of the aforesaid documents, but the master of the steamship *Ucayali* and her owner, the Republic of Peru, learning of the sinkings of both neutral and warring vessels by enemy Axis submarines on the route between the Panama Canal and New York, decided to and did proceed to the port of New Orleans for the safety of the vessel, the cargo and the lives of the crew. At that time many other vessels, including ships owned or controlled by the United States through the United States Maritime Commission and the War Shipping Administration, were being similarly diverted from North Atlantic into Gulf ports for the same reason.

Thereafter and during the course of the discharge of the steamship *Ucayali* at New Orleans, La., and on or about the 30th day of March, 1942, Galban Lobo Co., S. A., a corporation organized and existing under and by virtue of the laws of the Republic of Cuba, caused a libel to be filed in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division against Compania Peruana de Vapores y Dique del Callao, the agent of the steamship *Ucayali* for the Government of Peru, in personam, and against the steamship *Ucayali in rem*. The libel claimed to recover the sum of $100,000 by

reason of the discharge of the steamship *Ucayali* of her sugar cargo at the port of New Orleans instead of the port of New York. Thereafter, the Republic of Peru made immediate preparation to cause the dismissal of the libel and the release of its steamship *Ucayali* on the ground that the Republic of Peru was a friendly sovereign nation entitled to immunity from suit in the courts of the United States. The course of procedure necessary to effect this result as outlined by this Court in the case of *Ex Parte Muir*, 254 U. S. 522, *The Navemar*, 102 F. (2d) 444, and other cases cited *infra* Point III, required that appropriate instructions be given the Peruvian Ambassador by the Peruvian Government, that the Peruvian Ambassador make representations to our State Department, that the State Department advise the Attorney General of the claim of immunity, and that the Attorney General instruct the United States Attorney for the appropriate district to file the appropriate suggestion of immunity in the court proceedings. The necessity for communication between Peru and Washington to obtain instructions that the Peruvian Embassy at Washington make representations to the American Department of State, the necessity that the American Department of State make appropriate representations to the United States Attorney General, and for the latter in turn to instruct the United States Attorney for the Eastern District of Louisiana—consumed many days so that it became necessary to cause the release of the steamship *Ucayali* from the libel aforesaid so that the vessel might engage first in the transportation of materials and supplies for the United States Government, and thereafter to engage in her necessary business in behalf of the people of the Republic of Peru. Accordingly, on or about the 9th day of April, 1942, the master of the steamship *Ucayali* filed the claim of the Republic of Peru to the said vessel, the claim expressly reserving the privilege and right

of the Republic of Peru to cause the dismissal of the suit against its vessel on the ground of sovereign immunity. Bond in the sum of $60,000, as agreed upon between counsel for the Republic of Peru and for libelant in the said action, was thereupon likewise filed, containing the same reservation of the right to dismiss the libel on the ground of sovereign immunity, for the purpose of expediting the return of the vessel to useful service under the emergency which then existed and still continues.

Thereafter, and on or about April 11, 1942, proctors at New Orleans for the Republic of Peru, with proctors for libelant, under reservation by proctors for the Republic of Peru of its appearance as special only for the purpose of taking the testimony of the master as aforesaid and without waiver of its defense of the right to plead sovereign immunity, which reservation was not consented to by proctors for libelant, proceeded with the taking of the testimony of the master on the question of the reasons for and the conditions which necessitated the alteration of destination from New York to New Orleans. The deposition was taken at that time because the Republic of Peru considered it imperative to perpetuate the testimony of the master of its steamship *Ucayali*, as it was obvious that, under the general conditions of war which prevailed and with the destruction of vessels and consequent loss of life at its height as a result of the submarine menace, the master of the said vessel might never again be available for the purpose of giving his testimony if the case should ever reach that stage. In addition, the slow course of the necessary procedure for the formal presentation of the claim of the Republic of Peru to sovereign immunity made it impossible, in a practical sense, under the emergency conditions which then prevailed and under the universal need for ships and shipping space, to hold the vessel at New Orleans without perpetuating the testimony of the master

until the plea of immunity, originally and continuously reserved, could be presented with all the formalities.

Thereafter, the well-defined formalities prerequisite to the perfection of the plea of sovereign immunity in such cases still not being concluded because of the necessity for communications as above described and because of the delay of the United States Attorney for the Eastern District of Louisiana in receiving final authorization to proceed with the formal and orderly presentation of the plea, it became necessary to, and the Republic of Peru did, procure on April 18, May 8 and May 29, 1942, extensions of time within which to present adequately its pleas and defenses to the libel, particularly the defense of sovereign immunity. The appearances for the purpose of obtaining such extensions were specifically stated to be special and limited to the presentation of the motion for an extension and fully reserved the right of the Republic of Peru to plead sovereign immunity.

Thereafter and on or about the 7th and 29th days of June, 1942, the Republic of Peru, and Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, upon the letter of His Excellency M. de Freyre y Santander, Ambassador of the Republic of Peru to the United States, addressed to the Honorable Sumner Welles, Acting Secretary of State, upon the letter of the Honorable Sumner Welles to the Honorable Francis Biddle, Attorney General of the United States, upon the letter of the Honorable Francis Biddle to Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, and upon the suggestion of immunity filed by the said Herbert W. Christenberry, Esq., United States Attorney for the Eastern District of Louisiana, and upon the libel and complaint theretofore filed, moved the United States District Court for the Eastern District of Louisiana, New Orleans Division, for an order dismissing

the suit of the libelant for want of jurisdiction, on the ground that the suit was one against the property of a friendly foreign sovereign nation whose claim of sovereign immunity was recognized and allowed by the State Department. Annexed to the affidavit submitted in behalf of the Republic of Peru in support of said motion was documentary proof that at all times since August 24, 1937, the steamship *Ucayali* was the exclusive property of the Republic of Peru.

Thereafter, the motion of the Republic of Peru for the dismissal of the suit against it on the ground that it was entitled to immunity from such suits and that its claim to such immunity had been recognized and allowed by the State Department came on to be heard before Honorable Wayne G. Borah, District Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division, who, on the 13th day of October, 1942, rendered his opinion denying the claim of the Republic of Peru to sovereign immunity, on the ground that the said sovereign waived its immunity to suit for the reason that it had appeared generally in the suit because (1) it had applied for extensions of time within which to answer or to plead, and (2) it had taken the deposition of the master of its steamship *Ucayali*. An order was entered pursuant to and consistent with said opinion on or about October 16, 1942. Thereafter the Republic of Peru moved by order to show cause for a re-hearing on the subject of the opinion theretofore rendered in the cause overruling the plea of sovereign immunity, and upon such re-hearing and on or about the 18th day of November, 1942, the Honorable Wayne G. Borah ordered that the said motion be and the same was denied.

III.

A friendly sovereign power is entitled to immunity from suit in American courts by a private suitor.

The right of a friendly sovereign power to immunity from suits in the courts of another country, even in times not as extraordinary as at present, is well recognized, and the procedure employed in the instant case not only is precisely as prescribed in the decisions which have resulted in the granting of immunity, but that procedure has not been objected to or even questioned by libelant. The fact that the State Department recognized and approved the claim of the Republic of Peru to sovereign immunity makes it almost mandatory upon the District Court to grant such immunity and to dismiss the suit against it. Since a friendly foreign power is entitled to plead its immunity from suit as a matter of right, the Court had in fact no jurisdiction to entertain an action against it, and this principle is as applicable in the case of a merchant vessel of such sovereign as to a warship.

In *Berizzi Bros. Co.* v. *s/s Pesaro,* 271 U. S. 562, this Court said, at page 574:

> "We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

In *The Pesaro* case, the Court approved the doctrine which it had theretofore expressed, through Chief Justice MAR-

SHALL, in *The Exchange,* 7 Cranch 116, that a foreign sovereign is entitled to immunity from suit in our courts as a matter of right. While in that case a public armed ship was involved, *The Pesaro, supra,* shows that the same principle applies to all ships owned by foreign sovereigns. In *The Exchange,* Chief Justice MARSHALL said, at page 147:

> "If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

To the same effect is *The Parlement Belge,* 5 P. D. 197. See also: *Ex Parte Muir,* 254 U. S. 522; *The Navemar,* (2 C. C. A.) 102 F. (2d) 444; *Sullivan* v. *State of Sao Paulo,* (2 C. C. A.) 122 F. (2d) 355. In the latter case, consideration was given to the question of the significance to be attributed to the actions of the State Department and the District Attorney in recognizing and allowing the claim of immunity of a constituent state of the United States of Brazil, and the Court held (p. 357):

> "Evidently some favorable implication must be drawn, for sometimes the Department has declined to act at all, as in Compania Espanola v. The Navemar, *supra,* and Molina v. Comision Reguladora, 91 N. J. L. 382, 103 A. 397, and has even positively expressed itself as opposed to a claim of immunity. The Pesaro, D. C. S. D. N. Y., 277 F. 473."

On the authority of *Miller* v. *Ferrocarrill del Pacifico de Nicaragua,* 18 A. (2d) 688, the Court further held (in the

Sullivan case) that the test of the attitude of the Executive Department through the State Department toward the validity of a claim of sovereign immunity or its recognition and allowance should be supplied by the Executive's representations and not by the technical nature of its appearance. The Court said, page 357:

> "Here the Executive chose to transmit the claim, which act alone has been held to be an implied recognition."
>
> "And when pressed, it did much more. It not only vouched for the accuracy of the statements of fact made by the Brazilian Ambassador, but also declared it to be 'the view of the Department that the interest of the Government of Brazil in the funds, as explained in the Brazilian Ambassador's note of July 11, 1940, is of such character as to entitle them to immunity from attachment by private litigants.' This appears to be a clear recognition of the claim of the Brazilian federal government so far as the Department is concerned • • •."

The Court continued, on the same page:

> "We have no hesitation, therefore, in accepting these communications as the official representation of Executive acceptance of the Ambassador's claims. And therefore we accept for the purposes of decision herein the recitals of fact made by the Ambassador. Compare Banco de Espana v. Federal Reserve Bank, 2 Cir., 114 F. 2d 438, 443. • • •
>
> Courts will undoubtedly accept as conclusive Executive pronouncements on whatever might be considered a 'political,' as opposed to a 'judicial,' question, Doe ex dem. Clark v. Braden, 16 How. 635, 57 U. S. 635, 14 L. Ed. 1090, including the question whether one is a sovereign, Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; Duff Development Co. v. Kelantan Government (1924) A. C. 797, and the question whether one is a sovereign's privileged diplomatic representative.

United States v. Ortega, C. C. E. D. Pa., Fed. Cas. No. 15, 971; Engelke v. Musmann (1928) A. C. 433; see Ex parte Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222. Such questions as these must have been within the contemplation of the court in the Navemar case, when it said (303 U. S. page 74, 58 St. Ct. page 434, 82 L. Ed. 667): 'If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.' See Deak, supra, 40 Col. L. Rev. at page 462. For Executive action in respect to such questions, if not actually determinative of them, is at least the best evidence which it is possible to adduce. United States v. Liddle, C. C. E. D. Pa., Fed. Cas. No. 15,598."

LEARNED HAND, C. J., in a separate concurring opinion, said, at page 360:

"I can think of no rationale which will reconcile these doctrines except that the violation of a foreign state's possession is so grave an indignity as *ipso facto* to embarrass the relations between that state and the state of the forum; it is better that the wrongs of the court's nationals should be left to negotiation between the powers."

And again at the same page:

"The mere fact that the Department saw fit to transmit the protest at all was evidence that it regarded the issue as substantial; it might well, as in the case of The Navemar, supra, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, have left the ambassador to intervene personally. The language chosen, especially in the letter of November 22, 1940, bears out this inference. Not only had the Department earlier vouched for the truth of the 'statements of fact' in the protest, as I have said, but in that letter

> it declared that 'a *prima facie* case had been made' for immunity, and that 'the interest of the Government of Brazil * * * is of such a character as to entitle' the funds to 'immunity.' I cannot read this otherwise than that the Department thought the issue important enough for the district court not to proceed."

And at page 361:

> "Certainly, if the answer depends upon how far the suit will affect foreign relations, only our foreign office ought to decide it."

In the case now before the Court, the situation is identical. See quotation from letter dated May 5, 1942, to the Attorney General of the United States from Honorable Sumner Welles, Acting Secretary of State, quoted *supra*, pages 1, 2.

The several similar cases which have already arisen as a result of the present war amply support the principles heretofore enunciated. See: *The Maliakos*, 41 F. Supp. 697 (S. D. N. Y.); *Margaret-Tassia*, 41 F. Supp. 699; *The Ionnis P. Goulandris*, 40 F. Supp. 924. All three of the cases last cited concerned Greek vessels engaged in private trade but requisitioned by their Government prior to the service of process. On the suggestion of the Greek Ambassador to the Department of State and the notification by the Department of State to the Attorney General that it recognized and allowed the claim of immunity in precisely the same form as in the case at bar, the libels were dismissed.

IV.

The right of a friendly foreign sovereign to immunity should be denied only upon the clearest evidence that it waives or does not wish to assert that right; the mere filing of applications for extensions of time within which to plead or the taking of a deposition in extremis is no such clear expression, and the decisions relied upon by the Honorable Wayne G. Borah do not support his conclusion.

The fundamental principle is laid down in *The Exchange, supra,* page 8, that the right of a friendly foreign sovereign to immunity from suit can be denied only as a result of the exertion of power "in a manner not to be misunderstood." Until the power is so exerted, "the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."

In the case now before the Court, the District Judge has sought to deprive the sovereign, the Republic of Peru, of the right to maintain its dignity as such by immunity from suit, on the strength of somewhat elementary principles decided, in the main, in suits between private parties. The cases upon which the District Court relied exclusively are:

Ervin v. *Quintanilla* (5 C. C. A.) 99 F. (2d) 935;
The Sao Vicente (3 C. C. A.) 295 Fed. 829;
Dexter & Carpenter v. *Kunglig Jarnvagsstyrelsen* (2 C. C. A.) 43 F. (2d) 705;
Puerto Rico v. *Ramos,* 232 U. S. 627;
Murphy v. *Herring-Hall-Marvin Safe Co.,* 184 Fed. 495;
Nelson v. *s/s Munwood,* 1925 A. M. C. 136;
Clark v. *Southern Pacific Co.* (5 C. C. A.) 175 Fed. 122.

Ervin v. *Quintanilla* supports, not the proposition for which it was cited by the District Court, but the position relied upon by the Republic of Peru. In that case it was urged that the Republic of Mexico, the owner of the vessel sought to be released under a plea of sovereign immunity, had entered a general appearance on the following grounds: by (a) asking affirmative relief in the action, that is, that the taking of depositions be postponed; (b) appearing and asking affirmative relief for a defendant, the master of the ship against whom the action ran *in personam;* (c) tendering along with the suggestion of immunity an issue going to the merits, to wit, an issue as to the title and ownership of the vessel; and (d) praying that the libel be dismissed. The Court found, however, that the appearance and proceedings on the part of the Republic of Mexico were conducted throughout (as in the case at bar) "with the specific intent, for the specific purpose, and with the result alone of presenting a claim of immunity from the jurisdiction of the court."

In *The Sao Vicente,* the second case relied upon by the District Court, a general appearance was made by the sovereign which appeared by its proctors, filed a claim of ownership in the usual form, concluding with a prayer for leave to defend the action. The sovereign's proctors filed a stipulation for value and costs conditioned to "abide by all orders of the court, interlocutory and final, and to pay the amount awarded," and the ship was released from custody. Two months after the libel was filed, the sovereign changed its proctors, who filed their answer to the libel and for the first time raised the defense that the vessel was owned by the Portuguese Government, which Government asserted its right to sovereign immunity and protested the assumption of jurisdiction by the District Court. In addition, the Court held that the procedure employed by the sovereign in making its plea of sovereign immunity

was improper. The suggestion of immunity was presented by the Portuguese Minister directly to the Court instead of being presented through the Department of State in conformity with the formula approved in *Ex Parte Muir*, 254 U. S. 522, and the line of decisions which followed it, *supra*, page 9. Although the suggestion of the Portuguese Minister was accompanied by a certificate of the Secretary of State to the effect that the Minister, whose name was subscribed thereto, was duly accredited to this Government, that certificate contained a footnote by the Secretary of State that "For the contents of the annexed document the department assumes no responsibility" (p. 833). On that state of facts, the inappositeness of *The Sao Vicente* case becomes obvious.

Dexter & Carpenter v. *Kunglig Jarnvagsstyrelsen*, the next authority cited by the District Court, is equally beside the point. In that case, the sovereign itself brought suit. A counterclaim was asserted, the suit of the sovereign, the Swedish Government, was dismissed, and the counterclaimant held entitled to recover. Upon proceedings supplementary to execution, it was sought by the Swedish Government to vacate the order of attachment and writ of execution. The Court held that after the sovereign had invoked the jurisdiction of the Court, pleaded to a counterclaim and contested the merits of the respective claims until judgment was rendered against the sovereign, there was both a waiver of jurisdiction and a consent to the exercise of jurisdiction. Certainly it cannot be said that the mere application of the sovereign in the case at bar for extensions of time within which to plead until it could prove its claim of immunity and the taking of a deposition *in extremis*—all under an unmistakable reservation of its right to retain its plea of sovereign immunity—are in any sense analogous to the length to which the case had gone in the *Dexter & Carpenter* suit. Even in that suit, how-

ever, the Court held that although the sovereign had by its protracted course of conduct submitted itself to the jurisdiction, it was still immune from a levy of execution.

The situation in *Puerto Rico* v. *Ramos*, the District Court's fourth case, is as remote from that which exists in the case at bar as can be imagined. There, the Puerto Rican Government voluntarily petitioned to be made a party to an action between a private person and a judicial administrator of an estate. It secured a court order to be made a defendant against the resistance of the plaintiff. A year later the Government of Puerto Rico changed its viewpoint and raised the defense of sovereign immunity. This Court held, however, that "the immunity * * * from suit without its (the Government's) consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step." In the case at bar, the Republic of Peru has consistently, from the inception of the suit until the filing of its motion for dismissal of the libel on the ground of its sovereign immunity, maintained its right to assert such immunity, and neither of the acts which the District Court has held constituted a waiver of its right to assert such immunity were, under the circumstances, in fact inconsistent therewith.

Nelson v. *s/s Munwood*, the sixth case relied upon by the District Court, has no relation whatsoever to the situation involved in the case at bar. It was a suit between private parties, and no question of sovereign immunity was involved. The only point in the case (which is cited in an unofficial reporter only in part and is not officially reported) is as to whether an appearance which is styled special becomes general because a deposition was taken in the case. It seems clear from so much of the decision as is reported that there was not any special reason, as there was here, for the taking of the deposition at the particular

time and, as heretofore indicated, rules of construction which may be appropriate as between private parties, should not, for high reasons of state among others, be applied to a friendly sovereign nation which has throughout the matter reserved its plea and has preserved testimony only because of the imminent danger that its witness would not ever again be available if the case ever proceeded on its merits or if the sovereign for reasons of its own unequivocally elected to allow the suit to proceed.

The same criticism is applicable to *Clark* v. *Southern Pacific Co.*, the District Court's last authority. That also was a suit between private parties in which no sovereign was involved. The only question in that case was whether, after the plaintiff had brought suit in the State Court and the defendant had removed it to the Circuit Court, the taking of a deposition by the plaintiff in the Federal Court waived plaintiff's right to remand the suit to the State Court. The Circuit Court of Appeals for the Fifth Circuit held that in the particular circumstances of the case, the District Court had original jurisdiction despite the lack of diversity of citizenship of the parties and that that jurisdiction was conferred by the consent of the parties. No reservation of plaintiff's right to remand seems to have been made on the taking of the deposition and it was only after the plaintiff had continued to avail himself of the process of the Federal Court did he move to remand the cause to the State Court. Nothing in the state of facts recited in the decision in the *Clark* case makes it a fair analogy to the case at bar.

In upholding the immunity of the sovereign, the same principles are followed in England as are here urged in behalf of the Republic of Peru. In *Republic of Bolivia Explor. Syn.* (1914) 1 Ch. 139, even a general appearance asking for time to file evidence, filing evidence on the merits and raising no question of privilege, were held not to con-

stitute a waiver of immunity. In *The Jassy*, (1906) P. 270, an unauthorized appearance and an unauthorized undertaking by an agent to file bail were held not to cause the vessel to lose her immunity.

The error into which the District Court fell is manifest from the many decisions holding that an agreed postponement does not convert a special into a general appearance. In *Meisukas* v. *Greenough Red Ash Coal Co.*, 244 U. S. 54, the defendant appeared specially for the purpose of objecting to the jurisdiction of the Court over it. Upon the return date of the hearing, it was adjourned on condition that the defendant should not lose its right to plead to the merits if, on the hearing of the question of jurisdiction, authority to entertain the cause was sustained. The appeal to this Court was taken on the ground that the ruling below was not subject to consideration because the challenge to the jurisdiction was waived by the proceedings which were taken to question it. At page 57, the Court said:

> "Generically this would seem to rest upon the proposition that because there was a special appearance on the face of the summons and complaint challenging the jurisdiction, thereby the right to so challenge was waived. But the contrary has been so long established and is so elementary that the proposition need be no further noticed.
>
> Although this be true, the argument further is that the right to be heard on the challenge to the jurisdiction was lost because of the postponement of the hearing on that subject which was granted. This, however, in a different form but embodies the error involved in the proposition just disposed of. But aside from this, as the continuance was granted at the request of the plaintiff and for the purpose of enabling him to be fully heard on the subject of jurisdiction, no further reference to the proposition is required. Again, it is urged that because as a condition of the continuance the court reserved the right of the defendant to plead to the merits if on

the hearing jurisdiction was found to exist, therefore the question of jurisdiction was waived,—a conclusion which is again too obviously wrong to require more than statement to refute it."

See to the same effect:

McMurray v. *Chase Nat. Bank of City of New York,* 10 F. Supp. 960 (D. C. Wyo.);

Pine Hill Coal Co. v. *Gusicki,* (2 C. C. A.) 261 Fed. 974;

Yanuszauckas v. *Mallory S. S. Co.* (2 C. C. A.) 232 Fed. 132;

Budris v. *Consolidation Coal Co.* (E. D. N. Y.) 251 Fed. 673, holding further that a prayer for costs is not a waiver of a special appearance.

V.

Jurisdiction of the Court.

The jurisdiction of the Supreme Court to issue writs of prohibition and mandamus is plainly granted by Judicial Code, Section 234, 28 United States Code, Section 342. The section reads as follows:

"§ 342. (*Judicial Code, section 234.*) *Prohibition and mandamus.* The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party. (R. S. § 688; Mar. 3, 1911, c. 231, § 234, 36 Stat. 1156.)"

The suit herein is, of course, in admiralty, and a foreign sovereign state is a party therein. The denial of the motion to dismiss on the ground of sovereign immunity is obviously not appealable.

VI.

Conclusion.

The want of authority in the District Court to entertain this proceeding against the property of a friendly foreign sovereign or to assume jurisdiction over the subject matter of the libel, particularly in the light of the recognition by the Department of State of the right of the Republic of Peru to immunity from suit is so evident that the writ of prohibition should issue as prayed. The question of American foreign policy under war conditions, particularly as concerns all but two South American republics, is one of the greatest moment. Under present circumstances, even more than in normal times, those relations should, as was said by LEARNED HAND, C. J., in *Sullivan* v. *State of Sao Paulo, supra,* page 11, be left for determination to the Executive and not to the Judicial Departments and those circumstances justify the request of the Republic of Peru that the questions submitted to this Court now shall be fully determined and the error into which the District Court has fallen corrected.

Two principles seem to emerge from the decided cases: First, a sovereign (to that extent like any other litigant) cannot come into and go out of court at will finally to withdraw when the controversy goes against it. In the present cause, however, the sovereign was brought into court against its will and perpetuated testimony only as a necessary measure created by the emergency of war to protect itself if its plea of immunity should be overruled. The

second and more potent principle is that in our Government of divided powers, the courts yield to the Executive in matters involving our friendly relations with foreign nations. When present world conditions are considered, this latter principle cannot be thought either unwholesome or unimportant.

Respectfully,

MONROE & LEMANN
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